

STATEMENT OF THE CASE

Appellee-Petitioner Coy C. Tate (“Coy”) filed a petition for dissolution of marriage from Appellant-Respondent Albert L. Tate (“Albert”). Albert appeals from the trial court’s decree of marriage dissolution.

We affirm in part, and reverse and remand in part.

ISSUES

Albert raises the following issues for our review which restated are as follows:

- I. Whether the evidence supports the trial court’s award of continued medical insurance coverage to Coy to be provided by Albert.
- II. Whether the evidence established the existence and value of a pension plan through Albert’s employer.
- III. Whether the evidence supports the trial court’s award of \$2,000.00 of equity in the marital residence to Coy.

FACTS AND PROCEDURAL HISTORY

Albert and Coy were married on September 8, 2001. Two children were born of the marriage. During the course of the marriage, Albert and Coy purchased a home in Marion County, Indiana. Albert is employed by Quaker Oats Company. Coy is employed by Irwin Mortgage Corporation.

Albert and Coy were separated on June 15, 2004. Coy filed a verified petition for dissolution of marriage on September 10, 2004. The trial court held a preliminary hearing on October 20, 2004. The preliminary order entered by the trial court awarded temporary possession of the marital residence to Coy, along with the responsibility for

payment of the mortgage, utilities, and expenses. Joint legal custody of the minor children was to be shared, with Coy having primary physical custody of the children.

The final hearing in this matter took place on August 5, 2005. Testimony at the final hearing established that during the marriage, Albert would make the car payments and utility payments from his income, and Coy would have the mortgage payment amount on the marital residence automatically withheld from her pay. Coy's employer, Irwin Mortgage Company, held the mortgage on the marital residence. Albert provided health insurance for the family through his employer. The testimony established that Albert also provided health insurance coverage for Coy's son from a previous relationship, and for Albert's two children from a previous relationship.

The trial court issued its decree on August 30, 2005. The relevant portions of the decree provided that Albert should continue to provide health insurance coverage for his children with Coy, and also for Coy. The trial court did not require that Albert continue to provide coverage for Coy's son from a previous relationship. The trial court also ordered that Albert pay to Coy \$2,000.00, representing one-half of the equity lost in the marital residence due to Albert's failure to pay the mortgage payments. Further, the trial court ordered that Coy receive her portion of Albert's pension through Quaker Oats through a Qualified Domestic Relations Order.

Albert brings this appeal based upon those portions of the decree referred to above.

DISCUSSION AND DECISION

STANDARD OF REVIEW

On appeal, we will not set aside the findings or judgment in support of a dissolution decree unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. *Elkins v. Elkins*, 763 N.E.2d 482, 484 (Ind. Ct. App. 2002) citing *Bizik v. Bizik*, 753 N.E.2d 762, 766 (Ind. Ct. App. 2001), *trans. denied*. Findings are clearly erroneous when the record contains no facts to support them either directly or by inference. *Id.* The judgment is clearly erroneous if the findings do not support the conclusions of law or the conclusions of law do not support the judgment. *Id.*

The disposition of marital assets is within the sound discretion of the trial court. *Id.* When a party challenges the trial court's division of marital property, he must overcome a strong presumption that the court considered and complied with the applicable statute, and that presumption is one of the strongest presumptions applicable to our consideration on appeal. *Id.* In reviewing a trial court's disposition of the marital assets, we focus on what the court did, not what it could have done. *Id.*

When we review a claim that the trial court improperly divided marital property, we must decide whether the trial court's decision constitutes an abuse of discretion, considering only the evidence most favorable to the trial court's disposition of the property, without reweighing the evidence or assessing the credibility of witnesses. *Id.* at 484-85. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom. *Id.* at 485. An abuse of

discretion also occurs when the trial court has misinterpreted the law or disregards evidence of factors listed in the controlling statute. *Id.*

Although the facts and reasonable inferences might allow for a different conclusion, we will not substitute our judgment for that of the trial court. *Id.*

I. HEALTH INSURANCE COVERAGE

Albert contends that the trial court committed reversible error by requiring Albert to continue to provide health insurance coverage for Coy. The trial court's statement in the decree of dissolution was as follows:

6. Father shall maintain health insurance on both children as well as the Mother, but not for her prior born son, Mark. Mother shall pay the first six percent (6%) of any uninsured medical, dental, optical, and orthodontia expenses for [the children] each year, in the amount of \$1,372. Any additional uninsured expenses for that year are to be paid 37% by Mother and 63% by Father.

Appellant's App. p. 12.

The only way the trial court could have ordered Albert to continue providing health insurance for Coy would be as an order for maintenance. Therefore, we analyze this provision from that perspective.

The circumstances under which a trial court may order spousal maintenance payments are limited. *In Re Marriage of Erwin*, 840 N.E.2d 385, 390 (Ind. Ct. App. 2006). The trial court may order spousal maintenance after finding that the spouse requesting maintenance is incapacitated, is caring for an incapacitated child, or is in need of rehabilitative education. *Cox v. Cox*, 833 N.E.2d 1077, 1081 (Ind. Ct. App. 2005); Ind. Code §31-15-7-2.

In the present case, there was no evidence to establish Coy's entitlement to maintenance. In fact, the trial court made no findings necessary to support an award of maintenance by way of continued provision of health insurance benefits. Coy argues that the trial court did not err by failing to make findings because neither side requested that the trial court make specific findings of fact and conclusions of law.

Indiana Trial Rule 52(A) provides that the trial court on its own motion or at the request of one of the parties shall find the facts specially and state its conclusions thereon. However, the rule further provides that the trial court shall make special findings of fact without request in any other case provided by the trial rules or by statute. T.R. 52(A). Ind. Code §31-15-7-2 allows the trial court to award spousal maintenance if the trial court makes certain findings. Therefore, the trial court erred by failing to make the findings necessary to support its award.

Coy argues that Albert testified on direct examination that he would be willing to maintain health insurance for Coy through his employer if Quaker Oats would allow him to do so after the divorce and if it did not result in a cost to him. She contends that his argument here on appeal is inconsistent with that testimony. Coy seems to argue that this establishes an agreement to provide the maintenance where the statutory factors do not exist to support the award.

However, the record establishes that Albert further testified that he did not know whether he would be required to pay to keep Coy on his health insurance plan after the divorce. Albert then testified that he wanted Coy to provide for her own health insurance either through COBRA or through her own employer.

The record reflects that the statutory factors necessary to support an award of maintenance do not exist and were not found by the trial court at the conclusion of the final hearing. The evidence in the record does not establish that there was an agreement to provide health insurance. Therefore, the trial court erred by awarding maintenance to Coy by way of health insurance coverage. This provision is remanded so the trial court can revise paragraph 6 of the order by removing the portion requiring Albert to provide health insurance coverage for Coy.

II. ALBERT'S PENSION PLAN

Albert claims that the trial court erred when it awarded Coy a portion of a Quaker Oats pension plan. The relevant portion of the trial court's order is as follows:

12. Husband's Quaker Oats pension shall be valued by the coverture method, whereby the value of the retirement plan is multiplied by a fraction, the numerator of which is the period of time during which the marriage existed (while pension rights were accruing) and the denominator is the total period of time during which pension rights accrued. Wife shall receive her portion of Husband's pension through a Qualified Domestic Relations Order.

Appellant's App. p. 13.

The testimony presented at the final hearing pertaining to a Quaker Oats pension was as follows on direct examination of Coy:

Q: Your husband began working at Quaker Oats in April of 2001. Is that correct?

A: That's correct.

Q: And do you have any idea at this point what his pension or retirement benefits are at Quaker?

A: No, I don't.

Q: Are you asking the Court to award you 100 percent of those on the basis that you are unable to ever accrue the same amount of pension?

A: Yes.

Tr. p. 9.

And then on cross-examination of Coy:

Q: Okay. What evidence do you have that Mr. Tate has a pension?

A: I don't.

Q: Do you have a pension?

A: No, I don't.

Tr. p. 21.

The testimony listed above is all of the evidence presented regarding a pension plan at the final hearing.

All marital property goes into the marital pot for division. *Dowden v. Allman*, 696 N.E.2d 456, 458 (Ind. Ct. App. 1998). "Property" for purposes of dissolution is defined by statute as all the assets of either party or both parties including 1) a present right to withdraw pension or retirement benefits; 2) the right to receive pension or retirement benefits that are not forfeited upon termination of employment or that are vested but payable after the dissolution; and 3) the right to receive disposable retired or retainer pay acquired during the marriage that is or may be payable after the dissolution. Ind. Code §31-9-2-98. For a pension to be included in the marital pot, the pension must be vested. Ind. Code §31-9-2-98; *Grammer v. Grammer*, 566 N.E.2d 1080, 1083 (Ind. Ct. App. 1991).

Here, the record discloses that there was no clear evidence that Albert had a pension, and if so, that it was vested. Therefore, the trial judge abused his discretion by including the Quaker Oats pension in the marital pot and awarding Coy a portion of the pension. *See Grammer*, 566 N.E.2d at 1083.

III. AWARD OF EQUITY¹

Last, Albert argues that the trial court abused its discretion by awarding Coy \$2,000.00 as her share of the equity in the marital residence that was lost due to foreclosure. The trial court's award in this regard is as follows:

9. [Coy] shall have as her personal property:
 - b. One half (1/2) of the equity lost in the marital residence, in the amount of \$2,000, due to [Albert's] failure to pay the mortgage payments.

Appellant's App. p. 13.

Coy and Albert purchased a home in Indianapolis. Irwin Mortgage Corporation held the mortgage on their home. After Albert left the marital residence, the Tates fell behind on the mortgage payments. The testimony reveals that no payments were made on the mortgage between the date of their separation and the date Coy filed the petition for dissolution. The trial court entered a preliminary order awarding possession of the marital residence to Coy, and establishing responsibility for the mortgage payments thereon in her. Irwin proceeded to foreclose upon the residence. The testimony established that there was no deficiency after the sale of the marital residence. There is no evidence establishing the purchase price or the value of the real estate at the time of the default on the mortgage.

However, Coy testified that there was \$4,000.00 of equity in the real estate that was lost due to the default on the mortgage. The trial court heard the testimony of the parties regarding the disparity in their income and contributions to the payment of the

¹ Coy has filed a motion to strike portions of Albert's brief in which reference is made to bankruptcy proceedings. There was no testimony or evidence presented about the bankruptcy proceedings at the final hearing. Therefore, the motion is proper and is granted.

bills from the time of separation forward. Coy testified that she received no monetary contributions from Albert from June 2004 through September 2004. Therefore, while the evidence establishing the amount of equity is scant, it is not our job to reassess the credibility of witnesses or reweigh the evidence. *Wilfong v. Cessna Corp.*, 838 N.E.2d 403, 406 (Ind. 2005). Although conflicting evidence exists, there was evidence in the record to support the trial court's decision to award Coy \$2,000 of equity that was lost due to the foreclosure on the marital residence. There was evidence in the record to support the trial court's conclusion that the foreclosure was the result of Albert's failure to contribute monetarily to the family for a period of time. The trial judge did not abuse his discretion here.

CONCLUSION

The trial judge abused his discretion by ordering Albert to provide health insurance coverage for Coy. The necessary findings required to support an award of maintenance were not made or established in the record. Next, the trial judge abused his discretion by awarding Coy a portion of a pension plan where the existence of the plan was not established. The evidence did not show that Albert had a plan that had vested. The trial judge did not abuse his discretion by awarding Coy \$2,000.00, or one-half of the equity in the marital residence lost due to foreclosure.

Therefore, we remand this matter to the trial court to modify its order by removing Coy's entitlement to health insurance coverage provided by Albert, and to remove the provision entitling Coy to a percentage of a pension plan.

Affirmed in part, reversed and remanded in part.

BAKER, J., and MAY, J., concur.